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7 CONDALISA LEGRAND,
8 Plaintiff,
9 v.
10 ABBOTT LABORATORIES,
11 Defendant.

Case No. [22-cv-05815-TSH](#)

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS PURSUANT TO
RULE 12(h)(3)**

Re: Dkt. No. 172

12
13 **I. INTRODUCTION**

14 Condalisa LeGrand brings this putative class action against Abbott Laboratories
15 ("Abbott"), alleging certain statements on the labels of Abbott's Ensure® nutrition drinks are false
16 and misleading. ECF No. 116 (Second Amended Complaint). Pending before the Court is
17 Abbott's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(h)(3).¹ ECF No. 172
18 ("Mot."). Abbott argues that dismissal is warranted because LeGrand lacks Article III standing,
19 and LeGrand does not have standing to pursue injunctive relief. *Id.* The Court finds this matter
20 suitable for disposition without oral argument and **VACATES** the August 7, 2025, hearing. *See*
21 Civ. L.R. 7-1(b). For the reasons stated below, the Court **DENIES** the motion.²

22 **II. BACKGROUND**

23 **A. Factual Background**

24 Abbott is an Illinois corporation that manufactures, markets, and distributes several

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26 ¹ For precision's sake, citations herein are to the unredacted version of Abbott's Motion to
27 Dismiss (ECF No. 173-4).

28 ² The parties consent to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). ECF Nos. 9,
27 27.

1 different “nutrition” shakes and drinks under its Ensure brand. Second Amended Complaint
2 (“SAC”) ¶¶ 1, 9 (ECF No. 116); Answer ¶¶ 1, 9 (ECF No. 156). LeGrand is a California resident
3 who purchased Ensure products on multiple occasions. SAC ¶¶ 8, 107.

4 In this putative class action, LeGrand alleges that certain statements on the labels of Ensure
5 products are false and misleading. *Id.* ¶¶ 2, 46, 66, 77, 80, 104.

6 **B. Factual Support For Jurisdiction**

7 In her motion for class certification, currently pending before the Court, LeGrand moves to
8 certify a class of persons who purchased certain Ensure products in California from October 6,
9 2018, to the time the class is notified (the “Class Period”). Motion for Class Certification (“Mot.
10 Cert.”) at 1 (ECF No. 137-3). LeGrand’s proposed class involves three Ensure products (the
11 “Challenged Products”): Ensure Original Nutrition Shake; Ensure Plus Nutrition Shake; and
12 Ensure Complete Nutrition Shake. *Id.* LeGrand is a California resident who purchased Ensure
13 Original on multiple occasions during the Class Period. SAC ¶¶ 8, 107. LeGrand also purchased
14 Ensure Plus during the Class Period. Mot. Cert. at 13:7–15 (citing Declaration of Condalisa
15 LeGrand (“LeGrand Decl.”) ¶ 2 (ECF No. 136-4)). In purchasing the products, LeGrand was
16 exposed to and relied on Abbott’s label representations, such as that the products were “Doctor
17 Recommended” and “nutrition shake[s].” SAC ¶ 108.

18 LeGrand first learned about Ensure in 1994, when she purchased Ensure Plus for her
19 grandfather who was terminally ill. Declaration of Jack Fitzgerald in Support of LeGrand’s
20 Opposition, Ex. 1 (“LeGrand Dep. Tr.”), at 18:16–25, 19:1–3 (ECF No. 177-1). LeGrand began
21 purchasing Ensure for herself in the late 1990’s. *Id.* at 21:10–22. LeGrand first purchased Ensure
22 at Walgreens and usually purchased Ensure Plus. *Id.* at 11:24–25, 22:16–23:6, 94:20–23.
23 LeGrand consistently purchased Ensure products for her own use between the late 1990’s and
24 early 2022. *Id.* at 23:8–15, 228:13–229:11. Overall, LeGrand made over 500 Ensure purchases
25 since the late 1990’s and more than 100 Ensure purchases since 2019. *Id.* at 29:15–18, 43:20–23,
26 48:11–49:16.

27 During the Class Period, LeGrand purchased the Challenged Products multiple times a
28 month, once a month, or every few months between October 2018 and around April 2022,

1 depending on various factors. *Id.* at 29:12–30:22, 32:2–13; LeGrand Decl. ¶ 2. Most often,
2 LeGrand purchased Ensure Plus, but Ensure Original represented one out of every twenty or thirty
3 purchases. LeGrand Dep. Tr. at 56:7–16, 57:2–13. LeGrand also purchased Equate³ when Ensure
4 was not available. *Id.* at 96:3–21, 116:3–9. But LeGrand did not purchase Ensure Complete at all.
5 Declaration of Tracie L. Bryant in Support of Abbott’s Motion (“Bryant Decl.”), Ex. A (LeGrand
6 Deposition), at 12:24–13:1 (ECF No. 173-3). On average, LeGrand consumed Ensure three times
7 a day during the times she used Ensure within the Class Period. LeGrand Dep. Tr. at 32:2–13,
8 33:9–34:11. During this time, LeGrand usually purchased the Challenged Products at Walgreens
9 or Walmart stores in Richmond or Oakland, California, but also made purchases at other Walmart
10 stores and possibly at CVS, Safeway, and Raley’s. *Id.* at 49:19–50:3, 291:15–20; SAC ¶ 107;
11 LeGrand Decl. ¶ 2; Bryant Decl., Ex. A, at 360:25–361:9, 406:5–12. LeGrand made both in-
12 person purchases and online purchases for in-store pickup and typically purchased with cash.
13 LeGrand Dep. Tr. at 50:23–51:12, 184:7–22, 186:20–187:7. She occasionally used a debit card to
14 purchase the Challenged Products but did not use a credit card. *Id.* at 185:8–13, 186:20–187:25.

15 LeGrand purchased and consumed the Challenged Products because she needed calories
16 and nutrition and because it was recommended for her grandfather as a healthy option. *Id.* at
17 42:20–43:3. LeGrand recalls seeing the statements, “#1 Doctor Recommended” and “Complete,
18 Balanced Nutrition,” on the Challenged products when she purchased them and thought Ensure
19 “was always advertised as a meal replacement, something that is complete, balanced, and
20 nutritious.” *Id.* at 70:13–71:3, 98:9–99:16, 322:11–18.

21 In 2022, after speaking with counsel and doing her own research, LeGrand learned that the
22 Challenged Products were harmful and not healthy because of their added sugars. *Id.* at 155:7–
23 157:14, 162:19–25. LeGrand “felt defrauded” because she had “purchased Ensure thinking that it
24 was a healthy and nutritious alternative for [her] meal replacement-wise, and that’s not what [she]
25 got.” *Id.* at 142:13–25, 193:19–24. The last time that LeGrand purchased the Challenged

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27 ³ Equate is “a brand manufactured and marketed by Walmart.” Mot. at 7:14–18; *see also*
28 LeGrand’s Opposition to Motion to Dismiss (“Opp.”) at 8:18–9:2 (stating that Equate is described
as a “nutritional shake”) (ECF No. 176).

1 Products for herself was around January or February 2022. *Id.* at 228:13–229:11; *see also*
2 LeGrand Decl. ¶ 2 (averring that Ensure purchases for herself stopped April 2022). By 2022,
3 LeGrand had stopped consuming all nutritional shakes. LeGrand Dep. Tr. at 35:12–22. Because
4 LeGrand is “not a nutritionist or a medical provider,” she does not understand the meaning of the
5 levels of sugar in the Challenged Products, even though the amount of sugar is displayed on the
6 nutrition facts panel on the Ensure bottle. *Id.* at 207:22–208:1, 212:2–19.

7 Between 2022 and 2024, LeGrand served as a conduit for her then husband—she used his
8 money to buy Ensure and Equate products for him but did not consume the products herself during
9 this time. *Id.* at 35:23–36:11, 46:21–47:4, 143:1–144:7, 281:20–23. In 2024, LeGrand stopped
10 buying these products for her husband when they divorced. *Id.* at 37:8–13.

11 During discovery, LeGrand produced receipts from the Walmart in Solano County
12 illustrating 39 online purchases made between January 2020 and October 2023. *Id.* at 291:15–
13 292:6; *see* Abbott’s Reply in Support of Motion to Dismiss (“Reply”) at 3 n.1 (ECF No. 180)
14 (citing Mot., Ex. 6 (Walmart Receipts Compilation) (ECF No. 172-7)). The receipts that were
15 produced show that LeGrand purchased Equate but not Ensure products. Mot., Ex. 6; LeGrand
16 Dep. Tr. at 276:2–9. During that time, LeGrand purchased the Challenged Products at other
17 Walmart stores which involved in-person purchases and paper receipts. LeGrand Dep. Tr. at
18 291:15–25, 292:1–6. LeGrand does not keep paper receipts after a purchase clears her account,
19 and she deletes emailed receipts once she verifies that her online order is completed. *Id.* at 292:1–
20 6, 364:22–365:9. Although LeGrand searched, she did not locate any other paper or emailed
21 receipts showing her purchases of the Challenged Products. Bryant Decl., Ex. A, at 188:17–
22 190:11; 302:9–303:7.

23 **C. Procedural Background⁴**

24 On October 6, 2022, LeGrand filed the initial complaint in this matter, seeking to bring a
25 class action. Compl. ¶¶ 1 n.1, 124 (ECF No. 1). In her complaint, LeGrand’s proposed class

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27 ⁴ The Court discusses only the procedural history that is pertinent to Abbott’s Motion to Dismiss.
28 The Court’s previous orders in this case contain a complete procedural history. *See, e.g.*, ECF No. 154.

1 included persons who purchased any of the following six Ensure brand nutrition drinks for
2 personal or household use during the Class Period: Ensure Original Nutrition Shake; Ensure
3 Complete Nutrition Shake; Ensure Compact Therapeutic Nutrition Shake; Ensure Clear Nutrition
4 Drink; Ensure Original Nutrition Powder; and Ensure Enlive Advanced Nutrition Shake. *Id.* On
5 March 10, 2023, LeGrand filed her first amended complaint. ECF No. 37.

6 LeGrand filed her operative Second Amended Complaint (“SAC”) on December 11, 2024.
7 ECF No. 116. In her SAC, LeGrand added the Ensure Plus Nutrition Shake to the list of
8 challenged products and added two paragraphs pertaining to Ensure Plus. SAC ¶¶ 1 n.1, 16–17.
9 In her SAC, LeGrand brought the following causes of action on behalf of the California subclass:
10 violation of California’s Unfair Competition Law (“UCL”) (Cal. Bus. & Prof. Code §§ 17200 et
11 seq.); violation of California’s False Advertising Law (“FAL”) (Cal. Bus. & Prof. Code §§ 17500
12 et seq.); violation of California’s Consumers Legal Remedies Act (“CLRA”) (Cal. Civ. Code §§
13 1750 et seq.); Breach of Express Warranties (Cal. Com. Code § 2313(1)); and Breach of Implied
14 Warranty of Merchantability (Cal. Com. Code § 2314). *Id.* ¶¶ 132–79. LeGrand brought the
15 following causes of action on behalf of all class members: Unjust Enrichment; Negligent
16 Misrepresentation; and Intentional Misrepresentation. *Id.* ¶¶ 180–200. LeGrand seeks, *inter alia*,
17 damages and injunctive relief. *Id.* ¶ 201.

18 On January 23, 2025, LeGrand filed a motion for class certification which is currently
19 pending before the Court. ECF No. 137-3 (“Mot. Cert.”). LeGrand moves to certify the following
20 class:

21 [A]ll persons who purchased Ensure Original Nutrition Shake, Ensure
22 Plus Nutrition Shake, or Ensure Complete Nutrition Shake (‘Ensure’)
23 in the State of California from October 6, 2018, to the time the Class
is notified (the ‘Class Period’).

24 *Id.* at 1. On April 24, 2025, Abbott filed an opposition. ECF No. 162-15 (“Opp., Mot.
25 Cert.”). On June 20, 2025, LeGrand filed a reply. ECF No. 168.

26 On July 2, 2025, Abbott filed its instant Motion to Dismiss pursuant to Rule 12(h)(3)
27 arguing that dismissal is warranted because LeGrand does not have Article III standing. ECF No.
28 172 (“Mot.”). On July 16, 2025, LeGrand filed an Opposition. ECF No. 176 (“Opp.”). On July

1 23, 2025, Abbott filed a Reply. ECF No. 180 (“Reply”).

2 III. LEGAL STANDARD

3 “Federal courts are courts of limited jurisdiction. They possess only that power authorized
4 by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen v.*
5 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Accordingly, “[i]t is
6 to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the
7 contrary rests upon the party asserting jurisdiction.” *Id.* (cleaned up); *accord Chandler v. State*
8 *Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

9 Federal Rule of Civil Procedure 12(b)(1) authorizes a party to move to dismiss a lawsuit
10 for lack of subject matter jurisdiction. “If the court determines at any time that it lacks subject-
11 matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. Pro. 12(h)(3). As such, “the
12 deadline for making a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is
13 prolonged by Rule 12(h)(3).” *Wood v. City of San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012);
14 *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) (explaining that a party or a court may
15 inquire into federal subject matter jurisdiction at any stage in the litigation). Moreover, lack of
16 Article III standing is properly raised in a Rule 12(b)(1) motion. *Iten v. Los Angeles*, 81 F.4th 979,
17 985 (9th Cir. 2023). Thus, challenges to Article III standing are properly raised in a Rule 12(h)(3)
18 motion. *Id.*; *see Caselman v. Pier 1 Imports (U.S.), Inc.*, No. 14-CV-02383-LHK, 2015 WL
19 106063, at *2 (N.D. Cal. Jan. 7, 2015). The party asserting federal subject matter jurisdiction
20 must establish standing by a preponderance of the evidence. *Leite v. Crane Co.*, 749 F.3d 1117,
21 1121 (9th Cir. 2014).

22 A jurisdictional challenge may be facial or factual. *Safe Air for Everyone v. Meyer*, 373
23 F.3d 1035, 1039 (9th Cir. 2004). Where the attack is facial, the court determines whether the
24 allegations contained in the complaint are sufficient on their face to invoke federal jurisdiction,
25 accepting all material allegations in the complaint as true and construing them in favor of the party
26 asserting jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Where the attack is factual,
27 however, “the court need not presume the truthfulness of the plaintiff’s allegations.” *Safe Air for*
28 *Everyone*, 373 F.3d at 1039. In resolving a factual dispute as to the existence of subject matter

1 jurisdiction, a court may review extrinsic evidence beyond the complaint without converting a
2 motion to dismiss into one for summary judgment. *Id.*; *see Gordon v. United States*, 739, F. App'x
3 408, 411 (9th Cir. 2018) (explaining that a court “may review any evidence, such as affidavits and
4 testimony, to resolve factual disputes concerning the existence of jurisdiction”) (cleaned up). To
5 overcome a factual challenge, a plaintiff must “support their jurisdictional allegations with
6 competent proof.” *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 944 (9th Cir.
7 2021) (cleaned up). Further, dismissal of a complaint without leave to amend should only be
8 granted where the jurisdictional defect cannot be cured by amendment. *Eminence Cap., LLC v.*
9 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

10 IV. DISCUSSION

11 Abbott argues that the Court should dismiss LeGrand’s claims for lack of jurisdiction
12 because (1) LeGrand cannot establish Article III standing; and (2) LeGrand cannot establish that a
13 threat of future harm exists as required for her claim for injunctive relief. Mot. at 1:13–26.
14 LeGrand contends that the uncontested evidence demonstrates that LeGrand purchased Ensure
15 for decades and that she stopped purchasing Ensure for herself once she was aware of Abbott’s
16 false advertising of the product. Opp. at 1:2–4, 16:11–13.

17 Where there is a single named class representative, a court must determine that the
18 representative has Article III standing prior to certifying the class. *See NEI Contracting & Eng'g,*
19 *Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019) (“Standing is the
20 threshold issue in any suit. If the individual plaintiff lacks standing, the court need never reach the
21 class action issue.”) (cleaned up). “If none of the named plaintiffs purporting to represent a class
22 establishes the requisite of a case or controversy with the defendants, none may seek relief on
23 behalf of himself or any other member of the class.” *Id.* (cleaned up).

24 Here, Abbott launches a factual jurisdictional attack against the lone named class
25 representative, LeGrand. Mot. at 5:1–14; *see generally* Mot. Cert. Thus, the Court must
26 determine whether LeGrand has Article III standing prior to ruling on LeGrand’s motion for class
27 certification.

28 In sum, the Court concludes that federal subject matter jurisdiction exists because LeGrand

1 has established Article III standing, and that LeGrand has standing to pursue claims for injunctive
2 relief. Accordingly, dismissal is not warranted.

3 **A. Article III Standing**

4 Abbott argues that LeGrand lacks Article III standing “because she has no evidence that
5 she purchased Ensure products and therefore could not have been injured in the course of any such
6 alleged purchases.” Mot. at 5:26–28. LeGrand contends that the uncontested evidence shows that
7 LeGrand “is a *bona fide* purchaser with standing.” Opp. at 9:5–23.

8 “To establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2)
9 that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be
10 redressed by a favorable judicial decision.” *NEI*, 926 F.3d at 532 (citing *Spokeo, Inc. v. Robins*,
11 578 U.S. 330, 338 (2016)) (internal quotation marks omitted). The familiar injury-in-fact
12 requirement mandates that a plaintiff show they “suffered an invasion of a legally protected
13 interest that is concrete and particularized and actual or imminent, not conjectural or
14 hypothetical.” *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)) (cleaned up).

15 Here, the Court finds that LeGrand has established by a preponderance of the evidence that
16 she has Article III standing to pursue her claims. Abbott argues that LeGrand cannot demonstrate
17 that she suffered an injury-in-fact because the preponderance of the evidence—including the
18 absence of documentary evidence proving Ensure purchases, LeGrand’s receipts showing
19 purchases of Equate, and “LeGrand’s ever-changing allegations regarding her supposed
20 purchases”—“shows LeGrand did not make any purchases of Ensure products at all.” Mot. at
21 5:26–10:6. LeGrand contends that her testimony and Declaration together provide “ample
22 evidence” of her Ensure purchases. Opp. at 9:5–15. The Court agrees—not only does Abbott
23 repeatedly mischaracterize LeGrand’s testimony, but its arguments also fail to pump up its
24 deflated motion.

25 Most importantly, despite its repeated assertions, Abbott cannot establish that LeGrand did
26 not purchase Ensure during the relevant Class Period. *See, e.g.*, Reply at 4:6–7 (“No receipts
27 reflect Ensure purchases because she *never* actually purchased Ensure.”) (emphasis added).
28 Abbott pronounces that LeGrand must have never purchased Ensure because the only receipts

1 produced by LeGrand show that she purchased Equate products and not Ensure. Mot. at 7:12–18.
2 But these receipts are from the time between January 2020 and October 2023. Mot., Ex. 6. In
3 comparison, the proposed Class Period is “from October 6, 2018, to the time the Class is notified.”
4 Mot. Cert. at 1. Even if Abbott could show—and it has not—that LeGrand did not purchase
5 Ensure between 2020 and 2023, Abbott’s Motion is devoid of evidence showing that LeGrand did
6 not purchase Ensure *at all* during the Class Period.

7 Abbott hangs its hat on the fact that LeGrand lacks documentary evidence proving the
8 existence of her Ensure purchases. But Abbott’s argument rests on a false dichotomy: either (1)
9 LeGrand does not have receipts for Ensure purchases because she did not purchase Ensure; or (2)
10 LeGrand has receipts for Ensure purchases because she did purchase Ensure. *See* Mot. at 8:10–11
11 (“LeGrand’s Walmart receipts *would* evidence any purchase of Ensure nutrition shakes had she
12 actually made any.”) (emphasis in original). To the contrary, LeGrand’s proffered evidence
13 supports a third option—LeGrand made the averred purchases despite her lack of receipts.
14 LeGrand consistently avers that she purchased the Challenged Products monthly during the Class
15 Period, purchased from several different stores, used varying methods of payment and purchase
16 options, and discarded receipts after purchases. *See, e.g.*, LeGrand Dep. Tr. at 23:8–15, 49:19–
17 51:12, 184:7–22, 185:8–13, 186:20–187:25, 228:13–229:11, 291:15–292:6, 364:22–365:9; SAC ¶
18 107; LeGrand Decl. ¶¶ 2–3. LeGrand further provides details about her purchase locations,
19 Ensure’s labeling and advertising, and cost of Ensure products relevant to their packaging options.
20 *See* Opp. at 4–8. Abbott offers no evidence that contradicts these statements by LeGrand, nor
21 does it explain how a snapshot of receipts involving a single debit card from a single store (the
22 Solano County Walmart) captures LeGrand’s entire purchase history. And Abbott wholly ignores
23 LeGrand’s testimony that during the time covered by LeGrand’s receipts, she also made in-store
24 purchases at the Richmond and Oakland Walmart stores and usually paid cash. LeGrand Dep. Tr.
25 at 186:20–187:7, 291:15–25; *see also* Opp. at 10:20–21 (“Abbott does not dispute Ensure was
26 available at the locations and times Ms. LeGrand testified she purchased it[.]”). By Abbott’s own
27 proffered evidence, these cash purchases—made at any Walmart store—would not be in
28 LeGrand’s online purchase history from Walmart. *See* Reply at 3:8–12 (citing Mot., Ex. 8

1 (Walmart Website) (ECF No. 172-9)).

2 Moreover, Abbott cites to no legal authority for its proposition that LeGrand’s “own
3 testimony claiming that she purchased Ensure products . . . is not enough to establish standing by a
4 preponderance of evidence at this stage.” Mot. at 6:5–10. Indeed, federal courts have held the
5 opposite: receipts are not a prerequisite to a cognizable consumer class action. *See, e.g., In re*
6 *ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 968 (C.D. Cal. 2015) (holding that plaintiffs’ lack of
7 receipts “does not deprive them of standing” and that “named plaintiffs’ failure to produce
8 evidence of the specific price that each paid does not compel the conclusion that they cannot show
9 injury in fact and lack Article III standing”). In short, LeGrand’s testimony and Declaration
10 constitute admissible evidence that set forth specific facts that establish her standing. *See*
11 *Gerlinger v. Amazon.com Inc., Borders Grp., Inc.*, 526 F.3d 1253, 1255–56 (9th Cir. 2008)
12 (explaining that at the post-pleading stage, a plaintiff “must set forth by affidavit or other
13 admissible evidence ‘specific facts’ as delineated in Federal Rule of Civil Procedure 56(e) as to
14 the existence of such standing”); *see also* Fed. R. Civ. P. 56(c)(1) (“A party asserting that a fact
15 cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of
16 materials in the record, including depositions . . . affidavits or declarations . . . or other
17 materials.”). Therefore, because the preponderance of evidence shows that LeGrand purchased
18 the Challenged Products during the Class Period, LeGrand has established an injury-in-fact
19 sufficient for Article III standing. *Leite*, 749 F.3d at 1121.

20 Further, Abbott’s cited cases are inapposite. Abbott claims the cases are on point because
21 they conclude “documentary evidence affirmatively shows that a plaintiff failed to purchase the
22 product at issue *at all*.” Mot. at 9:14–16 (emphasis added). But here, Abbott does not point to
23 affirmative evidence that LeGrand did not purchase the Challenged Products during the Class
24 Period.⁵ In *Bargetto v. Walgreen Co.*, the plaintiff testified that she purchased, or at least received

25 _____
26 ⁵ In its Reply, Abbott asserts that LeGrand misinterprets its cited cases as mandating dismissal
27 only where the *defendant* adduces evidence showing that the plaintiff did not purchase the
28 challenged product, and not where evidence produced by the *plaintiff* shows a lack of purchase.
Reply at 4:8–26. The Court does not understand this to be LeGrand’s proposition. The Court
considers all evidence presented by both parties concerning LeGrand’s purchase history, whether
produced by Abbott or LeGrand.

1 for free, defendant's plastic bag product on two specific dates, both from Walgreens; however,
2 defendant's transaction data "showing the units and retail sales by year" did not show that plaintiff
3 purchased its product. No. 22-CV-02639-TLT, 2024 WL 3493260, at *1–3 (N.D. Cal. June 14,
4 2024). The *Bargetto* court held that the plaintiff did not establish standing to pursue damages
5 because the preponderance of the evidence showed that the plaintiff "did not purchase any plastic
6 bags, but instead, received them for free." *Id.* at *7. In contrast to the plaintiff in *Bargetto*,
7 LeGrand testified that she *purchased* Ensure for decades, with more than 100 Ensure purchases
8 since 2019, that she purchased Ensure at multiple locations, and that she was certain that she
9 purchased the Challenged Products within the Class Period. LeGrand Dep. Tr. at 29:12–30:32,
10 32:2–13, 43:20–23, 48:11–50:3, 291:15–20. And unlike in *Bargetto*, Abbott does not proffer
11 evidence of transaction data showing that LeGrand did not purchase Ensure on any of the
12 occasions she avers to.

13 Similarly, in *Sud v. Costco Wholesale Corp.* and *Gonzalez v. Chattem, Inc.*, the defendants
14 produced affirmative evidence that the plaintiffs had not purchased defendants' products on *any*
15 *occasion*. See *Sud*, No. 15-CV-03783-JSW, 2016 WL 192569, at *3 (N.D. Cal. Jan. 15, 2016)
16 (submitting plaintiff's complete purchase history from Costco, the only store where plaintiff
17 allegedly purchased the defendant's product, showing that plaintiff did not purchase the product);
18 *Gonzalez*, No. 23-CV-00102-HSG, 2023 WL 8101923, at *4 (N.D. Cal. Nov. 21, 2023)
19 (submitting evidence that defendant's product was not available for purchase at the times the
20 plaintiff allegedly purchased the product). But here, that is simply not the case.

21 Finally, Abbott's *ad hominim* attack deserves short shrift. Abbott asserts that the Court has
22 "every reason to doubt the veracity of [LeGrand's] bare allegations." Mot. at 6:18–19. Using an
23 argument repeated from its Opposition to Class Certification, Abbott asserts that LeGrand has
24 "constantly var[ied]" her allegations regarding the type of Ensure products she purchased and the
25 locations where she made purchases.⁶ Mot. at 6:18–7:11; *see also* Opp., Mot. Cert. at 24:27–

26
27 ⁶ To be sure, Abbott points to a single inconsistency regarding the locations where LeGrand
28 purchased Ensure. Mot. at 6:22–27. LeGrand did indicate on one occasion that she is not certain
she purchased the Challenged Products at Walgreens during the Class Period. Compare LeGrand
Dep. Tr. at 55:1–8 (indicating since October 2018, she "definitely" made in-store purchases, but

1 25:16. However, Abbott mischaracterizes LeGrand's testimony. Contrary to Abbott's claim,
 2 LeGrand has not stated—in her Complaint or elsewhere—that she “*only* purchased Ensure
 3 Original.” Mot. at 7:3–8 (emphasis added); *see* SAC ¶ 107. Nor has LeGrand stated that she
 4 “*only* purchased Ensure at Walgreens and Walmart.” Mot. at 6:22–23 (emphasis added); *see* SAC
 5 ¶ 107. Abbott ignores the fact that LeGrand never stated in her Complaint or Declaration that she
 6 did not purchase other Ensure variations or that she did not shop at other stores for Ensure. *E.g.*,
 7 Opp. at 2 n.14. Given LeGrand's nearly thirty-year history with Ensure, it is unreasonable to
 8 expect her to recall every detail of every purchase made. LeGrand Dep. Tr. at 18:13–18.
 9 Therefore, Abbott's attack on LeGrand's credibility fails.

10 Accordingly, the Court **DENIES** Abbott's Motion to Dismiss for lack of Article III
 11 standing.

12 **B. Standing For Injunctive Relief**

13 Abbott argues that even if Article III standing exists for some claims, LeGrand lacks
 14 standing to seek injunctive relief because “she cannot establish any threat of future harm to her or
 15 that she can be credibly deceived by Abbott.” Mot. at 10:7–9. LeGrand contends that she did not
 16 buy Ensure for herself or consume Ensure after learning about the dangers of sugar present in
 17 Ensure. Opp. at 16:7–17.

18 “[A] plaintiff must demonstrate standing separately for each form of relief sought.”
 19 *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). “For
 20 injunctive relief, which is a prospective remedy, the threat of injury must be actual and imminent,
 21 not conjectural or hypothetical.” *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir.
 22 2018) (cleaned up). In a consumer class action:

23 a previously deceived consumer may have standing to seek an

24
 25 not online purchases, at Walgreens); *id.* at 94:24–95:7 (indicating she made the majority of
 26 purchases in 2019 at Walgreens); SAC ¶ 107 (alleging purchases made at Walgreens within the
 27 Class Period); LeGrand Decl. ¶ 2 (averring to purchases at Walgreens within the Class Period);
 28 Opp. at 7:5–8 (citing LeGrand Dep. Tr. at 52:18–23) (indicating at deposition in 2025 that she had
 not shopped at Walgreens for some time) *with* Bryant Decl., Ex. A, at 358:15–17 (indicating since
 October 2018, she “did not believe” that she made purchases at Walgreens). But this one
 inconsistency is not, as Abbott asserts, tantamount to “ever-changing allegations.” Mot. at 6:18–
 19.

1 injunction against false advertising or labeling, even though the
2 consumer now knows or suspects that the advertising was false at the
3 time of the original purchase, because the consumer may suffer an
4 actual and imminent, not conjectural or hypothetical threat of future
5 harm.

6 *Id.* at 969 (cleaned up). For example, a consumer plaintiff can establish standing for injunctive
7 relief by plausibly alleging “that she will be unable to rely on the product’s advertising or labeling
8 in the future, and so will not purchase the product although she would like to,” or by plausibly
9 alleging “that she might purchase the product in the future, despite the fact it was once marred by
10 false advertising or labeling, as she may reasonably, but incorrectly, assume the product was
11 improved.” *Id.* at 969–70.

12 Here, the Court finds that LeGrand has standing to seek injunctive relief. Abbott argues
13 that “LeGrand faces no threat of future harm because she concededly continued to buy Ensure
14 despite knowing about the alleged dangers of sugar.” Mot. at 10:19–21. Abbott asserts that these
15 continued purchases demonstrate that LeGrand “will continue to buy the product whether or not
16 the label ever changes.”⁷ *Id.* at 11:1–3. LeGrand responds that “[t]he uncontroverted testimony is
17 that, as a favor, Ms. LeGrand picked up Ensure for her husband, using his money.” Opp. at
18 16:11–12. The Court agrees. LeGrand testified that she stopped consuming Ensure in 2022 after
19 learning that it was not healthy; after this time, she only bought Ensure products for her then
20 husband who ultimately paid for the products. LeGrand Dep. Tr. at 35:23–36:11, 46:21–47:4,
21 143:1–144:7, 281:20–23. Abbott has not pointed to any evidence that LeGrand purchased the
22 Challenged Products for herself or with her own money after learning that they were not healthy.⁸

23 _____
24 ⁷ Abbott’s arguments contradict those regarding LeGrand’s Article III standing where Abbott
25 argues that LeGrand did not purchase Ensure during the Class Period at all. Opp. at 10:22–27. In
26 its Reply, Abbott responds that it “has advanced these arguments in the alternative.” Reply at
27 8:10–22. Fair enough. Abbott then asserts that “[i]f the Court credits LeGrand’s bald assertion
28 that she purchased the product at all (as would be necessary to allow any part of this case to
continue), the Court must also credit her allegations that she continued to do so after she claims to
have learned about the dangers of Ensure.” *Id.* Not so. As discussed, the Court disagrees with
Abbott’s interpretation of the evidence.

⁸ In contrast to its Motion, where Abbott argued that LeGrand’s shopping runs for her husband
show that “she continued to buy Ensure products until at least July 2024,” Abbott now argues in
its Reply that “LeGrand admitted she personally purchased Ensure using joint household funds.”
Compare Mot. at 10:18–28 *with* Reply at 7:18–8:9. The only evidence Abbott surmises of
LeGrand’s purported use of her own funds for continued purchases—appearing for the first time in
its Reply—is her testimony stating, “[o]ur household fund purchased them [Ensure products]. A

1 Nor has Abbott adduced evidence contradicting LeGrand’s testimony that she stopped consuming
2 all nutritional shakes in 2022. *Id.* at 35:12–22. Therefore, because the preponderance of the
3 evidence shows that LeGrand cannot rely on Ensure labeling in the future despite wanting to
4 purchase Ensure, LeGrand has established a threat of future harm sufficient for standing to pursue
5 injunctive relief. *Davidson*, 889 F.3d at 969–70.

6 Abbott’s cited cases do not compel a different result. This case is unlike *Cabrera v. Bayer*
7 *Healthcare LLC*, “in which the plaintiff’s testimony suggested she did not ‘place significant
8 weight’ on the challenged representation.” Opp. at 16:14–15; Mot. at 11:1–17 (citing *Cabrera*);
9 *Cabrera*, No. LA CV17-08525 JAK (JPRX), 2024 WL 1699357, at *6 (C.D. Cal. Feb. 23, 2024)
10 (observing “that Plaintiff has continued to purchase similar products that do not have all essential
11 vitamins and does not place significant weight on whether a product provides a ‘complete’ range
12 of vitamins”). In its Reply, Abbott faults LeGrand for not even attempting to distinguish several
13 of Abbott’s injunctive relief cases. Reply at 9. But these cases were buried in a fourteen-line
14 string site affixed to a one-sentence argument concerning LeGrand’s purported continuing
15 purchases. *See* Mot. at 11:1–17 (“By continuing to purchase both Ensure and Equate products
16 after supposedly learning of the dangers of added sugars, LeGrand has demonstrated that she will
17 continue to buy the product whether or not the label ever changes, eviscerating any claim to
18 injunctive relief.”). As discussed, LeGrand did address Abbott’s argument. *See* Opp. at 16:9–17.

19 Moreover, Abbott’s argument that LeGrand cannot be deceived by Ensure labeling is
20 unpersuasive. Mot. at 10:9; Reply at 10:22–25. LeGrand avers that she does not understand the
21 information on Ensure’s nutrition panel regarding added sugar or how to reconcile the nutrition
22 panel with statements on Ensure labeling. Opp. at 16:18–17:4 (citing LeGrand Dep. Tr. at
23 207:22–208:1, 212:2–19). Abbott counters that LeGrand’s statements are “directly at odds with
24

25 combined household.” Reply at 7:18–8:9 (citing Bryant Decl., Ex. A, at 45:6–9). But LeGrand
26 testified that she and her husband maintained “separate accounts” and that “[h]e would give [her]
27 cash every week” for the store, including to buy Ensure for him “[a]t his request.” Opp. at 7:1–2
28 (citing LeGrand Dep. Tr. at 143:1–144:7). There is no indication that LeGrand considers the
“household fund” as something different than her then husband’s separate money, along with her
separate money, as used for separate purchases carried out by LeGrand. *See, e.g.*, LeGrand Dep.
Tr. at 143:14–20 (“He gives me his portion, and I take care of everything.”).

1 her deposition testimony that, in her view as developed over the course of her participation in this
2 litigation, whether a product is healthy depends upon whether its added sugar content exceeds 4
3 grams per serving.” Reply at 10:10–14 (citing Declaration of Tracie L. Bryant in Support of
4 Reply, Ex. 12 (LeGrand Deposition), at 242:16–244:2 (ECF No. 180-3)). But in the testimony
5 cited to by Abbott, LeGrand appears to be comparing different amounts of sugar posed to her. *See*
6 Bryant Decl., Ex. 12 at 242:4–24 (answering “yes” that four grams is an “excessive amount of
7 added sugar,” after being asked about three grams, and stating “[b]ecause we’re going higher in the
8 grams”). Indeed, the context of the discussion indicates that LeGrand is guessing as to what
9 amount of added sugar would be healthy. *See, e.g., id.* at 242:4–10 (“I believe that the higher in
10 grams you get, the more added sugar it is, which is unhealthy for you. So the lower would be the
11 better.”). This is consistent with her testimony that she “does not know the difference between”
12 different amounts of added sugar and does not “know the meaning” of the levels of sugar in
13 Ensure. Opp. at 16:21–25 (citing LeGrand Dep. Tr. at 207:22–208:1, 212:2–10). In short, Abbott
14 has not shown that LeGrand would know from Ensure labeling whether the product’s added sugar
15 content was healthy. Therefore, because the preponderance of the evidence shows that LeGrand
16 could reasonably be deceived in the future by Ensure labeling, she has established standing to
17 pursue injunctive relief. *Davidson*, 889 F.3d at 970.

18 Accordingly, the Court **DENIES** Abbott’s Motion to Dismiss LeGrand’s claims for
19 injunctive relief.

20 V. CONCLUSION

21 For the reasons stated above, the Court **DENIES** Abbott’s Motion to Dismiss pursuant to
22 Rule 12(h)(3).

23 **IT IS SO ORDERED.**

25 Dated: July 28, 2025

26 
27 THOMAS S. HIXSON
28 United States Magistrate Judge